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**ORIGINAL**

19  
9/18/01  
v

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREENE/GUILFORD ENVIRONMENTAL :  
ASSOCIATION, a non-profit corporation :  
incorporated under the laws of the :  
Commonwealth of Pennsylvania, CITIZENS :  
FOR PLANNED COMMUNITY GROWTH, :  
an unincorporated association organized :  
under the laws of the Commonwealth of :  
Pennsylvania, PAUL B. AMBROSE, JOHN G. :  
ENDERS, CHARLES F. RAHAUSER, BETSY :  
RAHAUSER, DOUGLAS A. WARNOCK, U.X. :  
VAGNERINI, THOMAS W. BUNDY, :  
STEPHEN P. BUCHER, ROGER J. :  
ROBERTSON, JAMES A. STRITE, JR., DAVID :  
A. GUTHRIE, :

Plaintiffs :

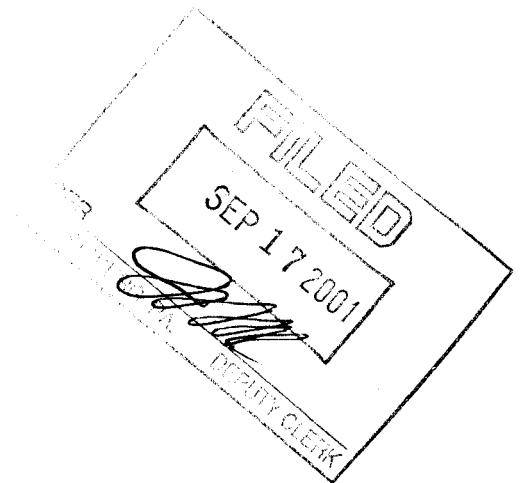
v. :

KEN WYKLE, Administrator, Federal :  
Highway Administration, ROBERT GATZ, :  
Federal Highway Administration, :  
Defendants :

and :

BRADLEY L. MALLORY, Secretary for :  
The Department of Transportation, :  
Commonwealth of Pennsylvania, :  
Intervenor. :

CIVIL ACTION NO.  
1:CV-01-0910  
(Judge Rambo)



DEFENDANTS' AND INTERVENOR'S MEMORANDUM OF LAW  
IN OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED DISCOVERY  
IN ADDITION TO THE ADMINISTRATIVE RECORD

## I. INTRODUCTION

Plaintiffs filed an action challenging the Federal Highway Administration's ("FHWA") approval of Alternative D Modified for the I-81 Interchange project located in Franklin County, Pennsylvania. Plaintiffs claim that FHWA failed to comply with the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Plaintiffs are opposed to an interchange located at Walker Road.

As part of the study process, Defendants prepared a Draft Environmental Impact Statement ("DEIS") dated May 1994, a Final Environmental Impact Statement ("FEIS") dated May 1995, a re-evaluation of the FEIS dated January 1999 (1999 re-evaluation), a Record of Decision ("ROD"), a re-evaluation of the Record of Decision dated June 2001 (2001 re-evaluation) and other technical documents. These documents, in addition to technical support data and a voluminous correspondence file, are a part of the administrative record, which forms the basis of review by this Court. The administrative record for this project consists of at least 8 boxes of documents.<sup>1</sup>

During the July 20, 2001 case management conference, plaintiffs informed this Court that they intended to subpoena several individuals for document production and/or depositions.

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<sup>1</sup> The Defendants and Intervenor expect to produce the administrative record within the next two weeks.

This Court ordered plaintiffs to file a motion and brief requesting discovery outside the administrative record by September 15, 2001.

On August 15, 2001, defendants filed an answer to the amended complaint. On that same day, the Secretary of the Pennsylvania Department of Transportation ("PennDOT") filed a motion to intervene with his answer attached. Plaintiffs filed their motion for limited discovery on or about August 30, 2001. Defendants and intervenor (hereinafter referred to collectively as "Defendants") jointly file this response in opposition to the discovery motion.

#### **ARGUMENT**

##### **A. The appropriate standard of review under NEPA.**

Judicial review under NEPA is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. §701 et seq. A reviewing court may only hold unlawful an agency decision if it is arbitrary, capricious, or otherwise not in accordance with the law. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983); Clairton Sportsmen's Club v. Pa. Turnpike Comm'n, 882 F. Supp. 455, 466 (W.D. Pa. 1995); Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52, 82 (E.D. Pa. 1985), aff'd 779 F.2d 41 (3d Cir. 1990), cert. den. 475 U.S. 1082 (1986); Philadelphia Council of Neighborhood

Ass'n v. Coleman, 437 F. Supp. 1341, 1346 (E.D. Pa. 1977).

Plaintiffs erroneously state that the standard of review adopted by the Third Circuit is the reasonableness standard of review. The Third Circuit has applied the arbitrary and capricious standard of review in deciding NEPA actions, including whether a supplemental EIS is necessary. Society Hill, 210 F.3d 168, 178-79(3d Cir. 2000) citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Concerned Citizens Alliance, Inc. v. Slater, 176 F.3d 686, 705 (3d Cir. 1999). It is this standard which should be applied in the instant action.

**B. The Court's review should be limited to the administrative record and extra-record discovery should not be permitted.**

Judicial review under the NEPA and NHPA is based solely on a review of the administrative record that was before the decision-makers at the time the relevant determinations were made.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); Vermont Yankee Nuclear Power Corp. Inc., 435 U.S. at 549; Don't Ruin Our Park v. Stone, 749 F. Supp. 1388 (M.D. Pa. 1990) (Rambo, J.), aff'd, 931 F.2d 49 (3d Cir. 1990). In Camp v. Pitts, 411 U.S. 138, 142 (1973), the Supreme Court stated "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." In Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n, 470 U.S. 729, 743-44 (1985), the Supreme Court again reiterated its holdings from Overton Park

and Pitts. "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." Id. at 743-44. Thus, in accordance with these standards a district court reviewing an agency decision acts like an appellate court, that is, the court does not hear or take evidence beyond that which is contained in the administrative record. William Cronin v. United States Dep't of Agric., 919 F. 2d 439, 443 (7th Cir. 1990).

The Third Circuit and the federal district courts in Pennsylvania have repeatedly limited appeals of agency decisions under the APA to the administrative record that was before the agency at the time the relevant determinations were made. In Twiggs v. United States Small Business Admin., 541 F.2d 150, 152 (3d cir. 1976), the Third Circuit remanded the case back to the district court because the district court, in rendering its decision, considered a deposition taken after the final agency decision was issued. The Court of Appeals found that the trial court erred in considering extra record evidence. In Dry Color Manufacturers' Ass'n v. Dep't of Labor, 486 F.2d 98 (3d Cir. 1973), the Third Circuit did not allow OSHA to rely on an expert report in support of its position because the report was not included in the administrative record. In Pa. Protect Our Water v. Appalachian Regional Comm., 574 F. Supp. 1203, 1215 (M.D. Pa.

1982) (Rambo, J.), aff'd per curiam, sub nom, Borough of Moosic v. Appalachian Reg'l Comm., 720 F. 2d 659 (3d Cir. 1983), the trial court disregarded the testimony of plaintiffs' and defendants' witnesses to the extent that the substance of their testimony did not appear in the administrative record, and the court did not rely on any exhibit that did not appear in the record. In Philadelphia Council of Neighborhood Ass'n, 437 F. Supp. at 1348-50, the trial court (considering cross motions for summary judgment) relied strictly on the administrative record and did not allow the plaintiffs to introduce any matters outside of the record. See also, Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Eng'rs, 526 F. Supp. 1063, 1068 (W.D. Pa 1981), and Don't Ruin Our Park, 749 F. Supp. 1388 (M.D. Pa. 1990), aff'd 931 F.2d 49 (3d Cir. 1990).

The Supreme Court has recognized only two exceptions to the well-settled administrative record rule. First, a federal district court may require some extra record explanation if the bare record does not disclose the factors considered by the agency or the decision-maker's construction of the evidence; second, supplementation may be permitted where there is a strong showing of bad faith or improper behavior. Overton Park, 401 U.S. at 420. Neither of these exceptions apply to the present situation.

In order to fit within the first exception, after reviewing the record the court - not the parties - decides if it requires further explanation. This exception is limited to instances where the court finds that the failure to explain the administrative action frustrates effective judicial review and is usually invoked to explain technical matters. Camp v. Pitts, 411 U.S. at 142-43. There is no basis for this exemption in this case.

The second exception discussed in Overton Park is also inapplicable to the present case. Plaintiffs are alleging bad faith on the part of the defendants by contending that the location of the interchange was pre-determined. Plaintiffs' face a difficult burden to successfully demonstrate bad faith. As the Supreme Court said:

[I]nquiry into the mental processes of administrative decision makers is usually to be avoided. And where administrative findings were made at the same time as the decision . . . there must be a *strong showing of bad faith* or improper behavior before such inquiry may be made.

Overton Park, 401 U.S. at 420 (emphasis added); See also Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 807-08 (8<sup>th</sup> Cir. 1998) (found no bad faith where post-Environmental Assessment ("EA") activities indicated a discrepancy between what was represented in the EA and actual logging practices); National Audubon Soc'y v. Hoffman, 132 F.3d 7, 16 (2<sup>nd</sup> Cir. 1997) (found no bad faith where former Forest Service employee alleged that

the Forest Service decided to issue a "finding of no significant impact" prior to completing the EA and that the NEPA training provided by the Forest Service taught employees to circumvent NEPA requirements) (emphasis added); Society Hill Towers Owners Ass'n v. Rendell, 20 F.Supp. 2d 855, (E.D. Pa 1998) aff'd 210 F.3d 168 (3d Cir. 2000) (found no bad faith based on plaintiffs' allegations that the NEPA review was a "sham").

Moreover, in addressing allegations of pre-determination under NEPA, the courts have relied on the contents of the administrative record. Coalition Against Raised Expressway, Inc. v. Dole, 835 F.2d 803, 807-08 (11<sup>th</sup> Cir. 1988); Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1161 (9<sup>th</sup> Cir. 1998); State of S. Carolina v. O'Leary, 953 F. Supp. 699, 706-08 (D.S.C. 1996); Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1025-26 (4<sup>th</sup> Cir. 1975). Specifically, the courts ask whether FHWA conducted the study in good faith. Coalition Against Raised Expressway, 835 F.2d at 808. In doing so, the courts referred to the administrative record to determine whether FHWA took a hard look at alternatives before reaching its decision. Id.

With regard to allegations of pre-determination "the test of compliance with § 102 of NEPA, . . . is one of good faith objectivity rather than subjective impartiality." Environmental Defense Fund v. United States Army Corps of Engr's, 470 F.2d 289,



296 (8<sup>th</sup> Cir. 1972). Agency officials are not required to be subjectively impartial so long as they objectively evaluate their project. Id. at 295. In fact, "NEPA assumes as inevitable institutional bias within the agency proposing the project" and has created procedures so that the decision maker is forced to review all the relevant information, thus limiting the effects of any bias. Id. at 295-96.

Plaintiffs here assert that statements made by PennDot officials are indicators of predetermination. The courts have routinely held, however, that statements made by agency officials regarding a preference for a specific alternative, prior to issuing the Final Environmental Impact Statement ("FEIS"), do not in themselves create a violation of NEPA. Environmental Defense Fund, 470 F.2d at 295-96; Coalition Against Raised Highways, 834 F.2d at 808. Instead, the courts have found these statements to be permissible "expressions of confidence." Coalition Against Raised Highways, 834 F.2d at 808 (found statement by FHWA to develop the "spur" alternative and Blakely Island Route sufficiently so that these alternatives could be dismissed in the EIS, was just an expression of confidence - the record showed that FHWA took the required "hard look" at the alternatives); Presidio Golf Course v. NPS, 155 F.3d 1153, 1161 (9<sup>th</sup> Cir. 1998) (found that the National Park Services' decision to build a new clubhouse prior to completing the EA was again an expression of

confidence.) See also, State of S. Carolina, 953 F. Supp. at 707; Fayetteville Area Chamber of Commerce, 515 F.2d at 1026.

In the present case, the administrative record shows that FHWA took the required "hard look" at the alternatives. FHWA participated in the development of the DEIS and FEIS for the project which evaluated in detail several alternatives at Walker Road and Kriner Road. As stated by plaintiffs themselves in their brief in support of this discovery motion, the pre-determination issue was raised throughout the NEPA process for the project. Correspondence included in the administrative record for the project documents this fact. Indeed, the administrative record reflects that FHWA considered and addressed the allegations of pre-determination on numerous occasions. See Ex. A at 80 (Response to Comments on the FEIS); Ex. B (July 6, 1996 memorandum to the Inspector General's Office from FHWA - also Attach. 3 of Pl.'s Mot.)<sup>2</sup>; Ex. C at 12 (Record of Decision); Ex. D at 3-4 (Responses to Manko, Gold, and Katcher letter dated December 8, 1995); Ex. E (April 15, 1996 Letter from FHWA responding to Greene/Guildford Environmental Association's January 26, 1996 letter). There is no need therefore, to go outside the record to determine the validity of plaintiffs' allegations of pre-determination.

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<sup>2</sup> Moreover, the Inspector General's office closed it's case file on July 23, 1997. Ex. B, p.4

Moreover, although plaintiffs make numerous allegations regarding PennDOT officials, they have failed to allege any bad faith or improper conduct by the Federal Highway Administration ("FHWA"). The administrative record shows that FHWA took a "hard look" at the environmental consequences of the project, as required by NEPA.<sup>3</sup> When the letters were exchanged between Ex-Secretary Yerusalum and Ex-Congressman Shuster, the preliminary alternatives report were already prepared and distributed, which identified Walker and Kriner Roads as two potential locations for the new interchange. Ex. D at 3. The selection of these two locations were based on environmental and engineering studies. Ex. D at 3. The DEIS and FEIS evaluated in detail several alternatives at each of these locations.

**C. Cases cited by Plaintiff actually support Defendants' position that review should be limited to the administrative record and discovery outside the record should not be permitted.**

Plaintiffs cite no cases permitting extra-record evidence or discovery when there was a voluminous administrative record. Indeed, plaintiffs' cases actually support defendants' position that extra-record evidence and/or discovery should not be

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<sup>3</sup> The letters quoted by plaintiffs in making its pre-determination argument are by state officials. These letters were included in comments on the FEIS for FHWA to review. Ex. B at 2. Moreover, out of the 16 individuals listed by plaintiffs as potential deponents, only one is from FHWA. The present appeal is from FHWA's decision to approve the I-81 interchange at Walker Road, not of decisions made by non-federal entities.

permitted in this case. See Animal Defense Council v. Hodel, 840 F.2d 1432, 1437-38 (9<sup>th</sup> Cir. 1988) (held that district court properly limited review to the administrative record and refused to permit discovery because the EIS discussed the information the Council (plaintiff) contends was ignored or inadequately explored); Don't Ruin Our Park, 749 F. Supp. at 1390-91 (held improper to take testimony in preliminary injunction hearing on the merits of the NEPA appeal); Pennsylvania Protest Our Water and Env'tl. Resources, 574 F. Supp. (Rambo, J.) (discussed supra).

Plaintiffs also cite the following cases in support of their contention that extra-record testimony was allowed: Preserve Endangered Areas v. United States Army Corps of Eng'rs, 87 F.3d 1242 (11<sup>th</sup> Cir. 1996); USA Group Loan Services, Inc. v. Riley, 82 F.3d 708 (7<sup>th</sup> Cir. 1996); City of Mount Clemens v. United States Env'tl. Protection Agency, 917 F.2d 908 (6<sup>th</sup> Cir. 1990); Franklin Savings Ass'n v. Office of Thrift Supervision, 934 F.2d 1127 (10<sup>th</sup> Cir. 1991). These cases actually support defendants' position.

In Preserve Endangered Areas, 87 F.3d at 1246-47, the court of appeals upheld the district court's order limiting review to the administrative record and prohibiting any discovery.<sup>4</sup> The court emphasized that the reviewing court would allow extra-record evidence only in rare circumstances. Id. at 1246. In USA

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<sup>4</sup> Bad faith was not an issue in this case.

Group Loan Services, Inc., 82 F.3d at 715, plaintiff argued that it should be permitted to conduct discovery "to uncover the full perfidy of the Department's conduct in the negotiation." The court did not allow additional discovery holding: "If as in this case the public record discloses no evidence of bad faith on the part of the agency, that should be the end of the inquiry." Id. In City of Mount Clemens, 917 F.2d at 917-18, the City argued that it was entitled to a trial *de novo* based on bad faith by EPA, alleging that EPA was biased against funding a local plant project. Id. at 918. The Court found no bad faith, holding:

The City's unsubstantiated allegation that EPA acted in bad faith, when compared to the record of EPA's reasoned project evaluations and careful certification procedures, does not warrant an exception to the general rule that review of agency action is limited to the administrative record.

Id. Finally, in Franklin Savings Ass'n, 934 F.2d at 1138-39, the circuit court overturned the district court's *de novo* review. The circuit court found: the "Director did make formal findings and produced and certified a voluminous and detailed agency record for review that would enable the reviewing court to conduct a substantial and meaningful review from the agency record."<sup>5</sup> Id.

### III. CONCLUSION

Accordingly, this Court's review of agency action should be limited to an examination of the record compiled by FHWA at the

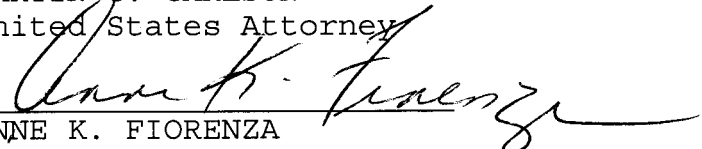
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<sup>5</sup> Again, bad faith was not an issue in that case.


time it made its decision and should exclude evidence that was not presented to FHWA. The United States Federal Highway Administration and the Pennsylvania Department of Transportation respectfully request this Court to deny plaintiffs' motion for limited discovery and limit review of this case to the administrative record.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

On this 17<sup>th</sup> day of September, 2001, she served a copy of the foregoing document by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by deposition said envelope and contents in the United States Mail at Harrisburg, Pennsylvania to:

Thomas Alan Linzey, Esquire  
Community Environmental Legal Defense Fund  
2859 Scotland Road  
Chambersburg, PA 17201

  
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REBECCA A. PLESIC  
Legal Secretary